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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Sacramento)

THE PEOPLE, Plaintiff and Respondent, v. JEFFREY MICHAEL DEPUE, Defendant and Appellant.	C045508 (Super. Ct. No. 03F00850)

Defendant Jeffrey Michael Depue attempted to purchase rock cocaine from the victim in this case. A dispute arose and defendant stabbed the victim to death. A jury convicted defendant of second degree murder (Pen. Code, § 187, subd. (a); further undesignated section references are to the Penal Code), with an enhancement for using a knife (§ 12022, subd. (b)(1)). The trial court sentenced defendant to state prison for 15 years to life for the murder and one year for the enhancement.

On appeal, defendant challenges a modified jury instruction and another instruction given in its entirety. Defendant claims

these instructions erroneously told the jury that, even though he was resisting a robbery, the homicide was not justifiable unless he was threatened with great bodily harm. He also claims the trial court erred by failing to instruct the jury, sua sponte, that homicide was justifiable if committed in an attempt to apprehend a fleeing felon. We find no error in the jury instructions given and conclude the additional instruction would have been inappropriate because there was no evidence defendant was trying to apprehend the victim. Accordingly, we affirm the judgment.

FACTS

The killing occurred during the early morning hours in August 1999. Four witnesses testified to the circumstances of the stabbing: (1) Charles Carbone, defendant's friend at the time; (2) Larry White, a drug dealer who had been standing with the victim; (3) Jay Proffitt, who lived nearby and overheard part of the altercation; and (4) defendant.

Carbone testified he and defendant had dinner, went drinking, and decided to buy drugs. Before doing so, they went to Carbone's apartment. Carbone owned several knives, and, according to Carbone, defendant could have unbeknownst to him taken one before they left to buy drugs. Carbone did not remember carrying a knife himself or seeing one in defendant's possession before, during, or after the killing.

Carbone and defendant were both drunk. They walked to an intersection in Sacramento where defendant spoke with the

victim. Carbone testified that he did not know precisely what defendant and the victim discussed but they began to struggle. It appeared they were fighting over something because both grabbed at the other's hands. Defendant and the victim crossed the street during the brief fight and fell behind some bushes. After the struggle, defendant ran away and Carbone ran with him because they were afraid of getting in trouble. Carbone noticed defendant's face was bloody and scratched and his shirt was stretched.

White testified he met the victim earlier on the day of the killing and was with him that night. White gave a videotaped statement to police shortly after the killing.

At trial, White initially testified he was unable to recall most of the pertinent facts, but he testified in more detail after he viewed the videotape. A redacted version of the tape was admitted into evidence.

According to White, defendant and Carbone approached White and the victim and said they wanted to buy drugs. White was unable to identify defendant or Carbone at trial, but their identity is established by the other evidence, including defendant's own testimony. The two gave the victim $15 in exchange for what appeared to be fake cocaine. The victim then turned and ran across the street where he tripped and fell. As he fell, defendant sliced him with the knife. The victim attempted to get away and defendant pursued him and repeatedly stabbed him in the stomach. Defendant seemed to be enjoying it.

At one point, Carbone pulled a knife on White to prevent him from intervening.

Proffitt testified he had been living nearby at the time. He remembered waking to the sound of people arguing outside. He heard a man yell, "I'm going to drop you," and another voice say, "Don't do it. Don't do it." A voice that sounded like the first responded, "Shut up. I know what I'm doing." Proffitt heard other yelling but was unable to recall anything else that was said. After a couple minutes, it was quiet. Proffitt looked out the window and saw one man run away and a second man follow, staggering and apparently holding his side.

Police found $15 in the area and a black binder belonging to the victim. A stab wound to his shoulder severed a major artery resulting in blood loss that produced irreversible shock within minutes. There were also cuts to his torso, left elbow, fingers, hands, left thigh, and left shin. It appeared some of these were defensive injuries and that the victim tried to grab the knife two or three times. The victim had a small amount of cocaine in his system but it was not indicative of significant intoxication at the time of death.

Defendant testified he and Carbone were both drunk when they decided to buy rock cocaine. Defendant purchased drugs in San Francisco in the past and experienced violence in doing so. Based on that experience, he took a double-edged dagger (in a sheath) from Carbone's apartment for self-defense. Defendant tucked the dagger into his pants while Carbone was in the bathroom.

Defendant testified that White and the victim approached them on the street and asked if they were looking for "anything." Defendant and Carbone said they needed to get change for a large bill, and they went into a bar but were unable to get change. Defendant subsequently asked whether he could buy a $20 rock for the $15 he had. White and the victim said "no," and defendant turned to ask whether Carbone had $5. The victim then grabbed the $15 out of defendant's hand and walked quickly away. Defendant did not initially describe a struggle; however, on redirect examination, he indicated there was some tugging and the victim was pulling to try to get away. In any event, defendant followed the victim, grabbed his arm, and demanded his money back or some "dope." The victim spit something out of his mouth and gave it to defendant, who showed it to Carbone. Carbone said it was "fake."

Defendant ran back to the victim, grabbed his shirt, and accused him of giving them "fake dope." Defendant demanded his money back, and the victim hit defendant's hand away and accused him of changing rocks. Defendant pulled out the dagger he was carrying, and the victim approached and yelled: "Do you know who I am? I'll drop you, motherfucker." Defendant repeatedly said, "Don't do it." Defendant was five foot nine inches tall and weighed approximately 175 pounds at the time, and the victim was much larger. Other evidence established that the victim was six foot three inches tall and weighed 219 pounds.

The victim ran across the street. Defendant testified that he was afraid but felt he (defendant) had the upper hand because

of the dagger. He wanted to get his money back and admitted he did not feel he could have called the police considering the circumstances. At one point, defendant chased the victim and grabbed at the back of his shirt, and the victim fell. Defendant also fell and might have accidentally cut the victim with the dagger. The victim subsequently ran away but tripped and fell again.

Defendant demanded his money back while holding the dagger over the victim. The victim reached up, grabbed the blade, and tried to pull it away. Defendant pulled the dagger back and continued to demand his money. The victim told defendant he had dropped it and defendant began to look around. The victim then started punching defendant in the face and defendant swatted the victim's arms with the dagger. The victim brought his leg up at some point as if to kick defendant and defendant hit him at the top of the knee with the dagger.

Defendant called to Carbone. The victim jabbed his fingers into defendant's face and eyes in an apparent attempt to gouge an eye out; the victim also pulled defendant down toward him. Defendant stabbed the victim in the shoulder to force him to let go. Defendant jumped up and ran away when the victim let go and Carbone said, "We've got to go." Defendant threw the dagger in a garbage can. He did not contact the police because he was scared.

DISCUSSION

I

CALJIC Nos. 5.10 and 5.16

Defendant claims the trial court erred by giving the following, modified version of CALJIC No. 5.10, which incorporated a second sentence requested by the prosecutor: "Homicide is justifiable and not unlawful when committed by any person who is resisting an attempt to commit a forcible and atrocious crime. *However, a life may not be taken if the character of the crime and the manner of its perpetration do not reasonably create fear of great bodily harm.*" (Italics added.)

According to defendant: "The modification of CALJIC No. 5.10 violated section 197, subdivision 1. It allowed the jury to disregard the Legislature's finding that robbery and mayhem are forcible and atrocious crimes as a matter of law. It did this by inviting the jury to convict [defendant] if it found he was not reasonably afraid of great bodily harm." Defense counsel objected in the trial court to the modification.

We note defendant's arguments also apply to mayhem, which he likewise claims is a forcible and atrocious crime as a matter of law. But on this point, there is essentially no dispute considering the law and the instruction the jury received. (See CALJIC No. 9.30.) Mayhem involves maiming the victim or committing some other disfiguring or disabling injury, and therefore necessarily contemplates great bodily injury. The fact that the jury was told that this type of threat was

required for justifiable homicide could not, then, have worked to defendant's detriment.

Defendant's claims of justifiable homicide are based on section 197, which has required judicial interpretation because its language is expansive. In pertinent part, the statute provides: "Homicide is also justifiable when committed by any person in any of the following cases: [¶] 1. When resisting any attempt to murder any person, or to commit a felony, or to do some great bodily injury upon any person . . . ." (§ 197, subd. (1).) In *People v. Ceballos* (1974) 12 Cal.3d 470 (*Ceballos*), the state Supreme Court narrowed the scope of the word "felony" as it is used in the statute and the People claim *Ceballos* supports the instructions given here.

In *Ceballos*, the court held in relevant part that a defendant's conduct was unlawful and indefensible under section 197, where the defendant set a trap gun that injured a teenager who was attempting to break into defendant's garage when he was not home. (*Ceballos*, *supra*, 12 Cal.3d at pp. 474-475, 480.) The court explained: "By its terms subdivision 1 of Penal Code section 197 appears to permit killing to prevent any 'felony,' but in view of the large number of felonies today and the inclusion of many that do not involve a danger of serious bodily harm, a literal reading of the section is undesirable." (*Ceballos*, *supra*, at pp. 477-478.)

The *Ceballos* court relied in part on a Court of Appeal decision, *People v. Jones* (1961) 191 Cal.App.2d 478, which held that section 197 "'does no more than codify the common law and

should be read in the light of it'" and which "read into section 197, subdivision 1, the limitation that the felony be '"some atrocious crime attempted to be committed by force."'" (*Ceballos*, *supra*, 12 Cal.3d at p. 478, quoting *Jones*, *supra*, at p. 481.) The state Supreme Court quoted *Jones* at length, emphasizing: "*Jones* (at p. 482) further stated, 'The punishment provided by a statute is not necessarily an adequate test as to whether life may be taken for in some situations it is too artificial and unrealistic. We must look further into the character of the crime, and the manner of its perpetration [citation]. *When these do not reasonably create a fear of great bodily harm*, as they could not if defendant apprehended only a misdemeanor assault, *there is no cause for the exaction of a human life*.'" (*Ceballos*, *supra*, at p. 478, italics added by the Supreme Court.)

The Supreme Court concluded that subdivisions 1 and 2 of section 197 (the latter applying to "defense of habitation, property, or person") should be limited in the same manner, i.e., to codify the common law rule that a killing is justifiable to prevent a forcible and atrocious crime. (*Ceballos*, *supra*, 12 Cal.3d at p. 478.)

Defendant, however, points out that the *Ceballos* court cited robbery as an example of a forcible and atrocious crime and indicated peril is presumed. Specifically, defendant's argument here depends on that portion of *Ceballos*, where, citing an 1882 Alabama Supreme Court opinion (*Storey v. State* (1882) 71 Ala. 329 (*Storey*)), the court observed in dicta: "Examples of

forcible and atrocious crimes are murder, mayhem, rape and robbery. [Citations.] In such crimes 'from their atrocity and violence human life [or personal safety from great harm] either is, or is presumed to be, in peril' [citations]." (*Ceballos, supra*, 12 Cal.3d at pp. 478-479.) Thus, he claims a reasonable apprehension of harm need not be shown.

We disagree. The court in *Ceballos* was establishing a rule of reason holding there was no justification for the exaction of human life absent the threat of great bodily harm and the court defined a forcible and atrocious crime in those terms. Its passing reference, without analysis, to the inclusion of robbery in a case decided 75 years before in another jurisdiction does not establish that robbery is a forcible and atrocious crime as a matter of law. And indeed, *Storey* held "[t]he safer view is that taken by Mr. Wharton, that the rule does not authorize the killing of persons attempting secret felonies, not accompanied by force.--Whart. On Hom. § 539." (*Storey, supra,* 71 Ala. at p. 339.) We note too, that *Storey*'s passing reference to robbery as a crime justifying the taking of the victim's life was itself dicta because the crime at issue there was larceny.

As can be seen, *Ceballos* held that a homicide committed to prevent a felony cannot be justified unless the felony is forcible and atrocious, that is, unless it is one that threatens death or serious bodily injury.

We also reject defendant's claim that *People v. Martin* (1985) 168 Cal.App.3d 1111 and *Gilmore v. Superior Court* (1991) 230 Cal.App.3d 416, indicate there need not be any threat to

defendant. Both cases involved justifiable homicide that occurred in an attempt to apprehend a fleeing felon pursuant to section 197, subdivision 4 (not resisting a felony pursuant to subdivision 1 or 2), and the court in *Martin*, *supra*, at page 1121, emphasized that the extended discussion in *Ceballos* was distinguishable in part on this basis. Further, the court in *Gilmore*, *supra*, at page 422, concluded that the undisputed facts established that the defendant had a reasonable belief he was threatened.

In all, while the modification to CALJIC No. 5.10 was unnecessary given the law set forth in CALJIC No. 5.16, the modification was an accurate statement of the law. There was no error.

Defendant also claims the trial court erred by giving both paragraphs of CALJIC No. 5.16 and this error aggravated the first. The jury was instructed: "A forcible and atrocious crime is any felony that by its nature and the manner of its commission threatens, or is reasonably believed by the defendant to threaten life or great bodily injury so as to instill in him a reasonable fear of death or great bodily injury. [¶] Mayhem or robbery are forcible and atrocious crimes." Defendant argues that the jury should have been instructed that robbery was a forcible and atrocious crime pursuant to the second paragraph, and the first paragraph should not have been given.

We agree that CALJIC No. 5.16 as given here might have been confusing to the extent it flatly stated robbery was a forcible and atrocious crime, but also included a definition of such a

crime that might not apply to some robberies. The instruction would have been adequate if it had simply defined a forcible and atrocious crime and left to the jury the issue of whether the robbery alleged here fit that definition. But any error in this respect was to defendant's benefit because it told the jury a defense against robbery, the crime defendant claimed to have been the victim of, was by definition a forcible and atrocious crime. The error was harmless by any standard.

II

Fleeing Felon

Defendant claims the trial court erred by failing to instruct the jury, sua sponte, that homicide was justifiable if committed in an attempt to apprehend a fleeing felon. This claim is based on subdivision 4 of section 197, which provides that homicide is justifiable "[w]hen necessarily committed in attempting, by lawful ways and means, to apprehend any person for any felony committed . . . ." A trial court has a duty to instruct, sua sponte, on an affirmative defense "only if it appears that the defendant was relying on the defense, or that there was substantial evidence supportive of the defense, and the defense was not inconsistent with the defendant's theory of the case." (*People v. Michaels* (2002) 28 Cal.4th 486, 529.) Substantial evidence is "evidence that a reasonable jury could find persuasive." (*People v. Barton* (1995) 12 Cal.4th 186, 201, fn. 8.)

According to defendant, there was substantial evidence the victim was killed as defendant attempted to apprehend him for

robbery. In support of his argument, defendant emphasizes his own testimony that the victim had taken his money and that he did not want to let the victim go because he had tried to rob him and still had his money.

Although we do not dispute that there was evidence the victim committed a robbery and/or some other common-law felony, there is no indication defendant was trying by lawful means to "apprehend" the victim. Rather, defendant's own testimony indicates he initially tried to get the victim to give him drugs or his money back after the victim grabbed his money. And after the victim gave him fake drugs, defendant supposedly tried to force the victim to give him his money back. There is absolutely no evidence or reason to infer defendant intended to "apprehend" the victim by arresting him and/or turning him over to police. (Cf. *Ceballos*, *supra*, 12 Cal.3d at p. 482 [no attempt to apprehend fleeing felon where defendant set trap gun for purposes of protecting property, preventing burglary, and avoiding possibility thief would injure defendant on his return].)

DISPOSITION

The judgment is affirmed.

HULL, J.

We concur:

RAYE, Acting P.J.

MORRISON, J.